Supreme Court, U.S.
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No. 99-135

IN THE

Supreme Court of the United States

WESTERN COAL TRAFFIC LEAGUE,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred through its failure to review interpretations and applications of Court precedent which the Surface Transportation Board used to create a new exception to the common carrier obligations of railroads, which new exception, in the court's words, permits railroads to exploit captive consumers.

CORPORATE DISCLOSURE STATEMENT

The National Industrial Transportation League is a non-profit membership corporation. It does not have any parent corporations and does not issue stock to the public.

No. 99-135

IN THE
SUPREME COURT OF THE UNITED STATES

WESTERN COAL TRAFFIC LEAGUE
v.
SURFACE TRANSPORTATION BOARD, ET AL.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE IN SUPPORT OF PETITIONER

This brief is submitted under the provisions of Rule 12.6 of the Rules of this Court on behalf of The National Industrial Transportation League ("NITL" or "the League"). Like the petitioner, Western Coal Traffic League ("Western Coal"), NITL was a petitioner for judicial review in the consolidated cases that resulted in the court of appeals decision in *MidAmerican Energy Co. v. Surface Transportation Board*, 169 F.3d 1099 (8th Cir. 1999), *reh. denied* (April 20, 1999). The League supports the petition of Western Coal in this Court for a writ of certiorari to review the decision of the court of appeals.

INTEREST OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The League is a nationwide association of shippers engaged in all types and sizes of commercial and industrial enterprises. NITL members are substantial users of rail

transportation. Founded in 1907, NITL is the oldest, largest and most broad-based shippers' organization in the nation. Its members include industrial corporations, manufacturers, retailers, shippers' associations, boards of trade, chambers of commerce, port authorities and others concerned with the purchase of freight transportation.

REASONS FOR GRANTING THE WRIT

This case involves one of the most important issues of federal law governing rail transportation since the enactment of the Staggers Rail Act of 1980.[1] As set out in detail in the petition by Western Coal, the Surface Transportation Board ("STB" or "Board") has seriously misconstrued seminal decisions of this Court interpreting the applicable provisions of the Interstate Commerce Act.[2] The decisions of this Court clearly establish the right of rail shippers to seek prescription of a reasonable rail rate for the portion of a through movement provided by a single railroad. *Great Northern Ry. Co. v. Sullivan,* 294 U.S. 458, 462-63 (1935); *Atchison, T. & S. F. Ry. Co. v. United States,* 279 U.S. 768, 776 (1929) and *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.,* 233 U.S. 479 (1914).

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1 Pub. L. 96-448, 94 Stat. 1895 (1980).

2 As noted in pages 2-3 and note 3 of the Western Coal petition and in note 8 of the court of appeals decision (App. A-11), while these cases were pending before the Board, the ICC Termination Act, Pub. L. 104-88, 109 Stat. 803 (Dec. 29, 1995) ("ICCTA"), repealed the Interstate Commerce Act, but reenacted many of the same provisions involved here in a new Interstate Transportation Act, 49 U.S.C. §10101, *et seq.* Section 204(b)(1) of ICCTA, however, required that the cases be decided by the Board and the courts under the prior law.

As succinctly stated by Western Coal, the court of appeals "not only did not correct the [STB's] error, it failed even to address it." Petition at 16. The court of appeals then compounded its error by affirming the Board's decision on the very economic and policy grounds that the Board expressly disavowed. The court of appeals stated that "the Board determined that exploiting bottlenecks ... assists carriers in achieving revenue adequacy." App. A-18. The STB, on the other hand, stated that its decision was "mandated by the law" and not by revenue adequacy considerations. App. B-21, note 21. The League, Western Coal and the other shipper parties before the court of appeals were thus deprived of meaningful judicial review. *Motor Veh. Mfrs. Assn. v. State Farm Mutual,* 463 U.S. 29, 50 (1983) and *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947).

The evolution of the railroad industry during the last 20 years has resulted in a highly concentrated railroad system with numerous bottleneck situations. Congressional policy explicitly favors maximizing competition and minimizing regulatory control, while preserving the right of rail shippers to obtain reasonable rates "where there is an absence of effective competition." Former 49 U.S.C. §10101a. The errors of the Board and the court of appeals leave rail shippers, in the words of the court of appeals, with no "means of preventing the carriers from exploiting bottleneck profits." App. A-22. Unless reviewed and corrected by this Court, those errors will result in an unjustified frustration of the Congressional purpose.

CONCLUSION

The petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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